80-1626

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FILED
MAR 27 1981
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

October Term, 1980

No. _____

DANIEL J. McCARTHY, SUPERINTENDENT,
CALIFORNIA MEN'S COLONY EAST,

Petitioner,

v.

THEODORE MONROE HARPER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a state inmate has exhausted his state remedies within the meaning of section 2254 of Title 28 of the United States Code where the contentions presented in the state's highest court consist of unintelligible conclusory statements which were not the substantial equivalent of the contentions presented to the United States District Court in a petition for writ of habeas corpus.

2. Whether when a state's highest court denies a petition for writ of habeas corpus without citation of authorities and without giving any other reasons for the denial it is properly presumed that the state court reached the merits of the contentions even though the petitioning party made only unintelligible conclusory allegations.

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In the Supreme Court of the United States

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No. _____

DANIEL J. McCARTHY, SUPERINTENDENT, CALIFORNIA MEN'S COLONY EAST,

Petitioner,

v.

THEODORE MONROE HARPER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INTRODUCTION

Petitioner, Daniel J. McCarthy, Superintendent of California Men's Colony, respectfully prays that a writ of certiorari be issued to review the judgment and memorandum opinion of the United States Court of Appeals for the Ninth Circuit reversing the judgment of the United States District Court for the Central District of California dismissing respondent's petition for writ of habeas corpus on the grounds of failure to exhaust state remedies. A

petition for rehearing and suggestion for rehearing *en banc* was denied on December 31, 1980. Petitioner's motion for stay of the mandate was denied by the United States Court of Appeals for the Ninth Circuit on January 15, 1981. Justice William H. Rehnquist granted petitioner's application for stay of the mandate on January 30, 1981.

OPINIONS BELOW

The Judgment and Report and Recommendation which formed the basis of the Judgment of the United States District Court, Central District of California dismissing respondent's petition for writ of habeas corpus appears as Appendix A of this petition. A copy of the memorandum opinion of the United States Court of Appeals for the Ninth Circuit reversing the judgment of the United States District Court appears as Appendix B of this petition. A copy of the order of the United States Court of Appeals for the Ninth Circuit denying petitioner's petition for rehearing and rejecting the petition for rehearing *en banc* appears as Appendix C of this petition. A copy of the order of the United States Court of Appeals for the Ninth Circuit denying petitioner's motion for stay of the mandate appears as Appendix D of this petition. A copy of the opinion of William H. Rehnquist granting petitioner's application for stay of the mandate appears at 49 U.S.L.W. 3558.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was filed and entered on October 23, 1980. The denial of a timely petition for rehearing and suggestion for rehearing *en banc* was filed and entered on December 31, 1980. This petition for writ of habeas corpus was filed within 90 days of that date and is therefore timely filed.

STATUTORY PROVISIONS INVOLVED

The pertinent portion of section 2254 of Title 28 of the United States Code reads:

"(a) . . . .

"(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

Rule 4, following section 2254 of Title 28 of the United States Code reads:

"The original petition shall be presented promptly to a judge of the district court in accordance with the procedure of the court for the assignment of its business. The petition shall be examined promptly by the judge to whom it is assigned. If it plainly appears from the fact of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified. Otherwise the judge shall order the respondent to file an answer or other pleading within the period of time fixed by the court to

take such other action as the judge deems appropriate. In every case a copy of the petition and any order shall be served by certified mail on the respondent and the attorney general of the state involved."

STATEMENT OF THE CASE

Respondent Harper, while incarcerated at California Men's Colony located at San Luis Obispo, California, filed a petition for writ of habeas corpus in the United States District Court, Central District of California. The petition was filed pursuant to section 2254 of Title 28 of the United States Code. In the petition, respondent Harper attacked his plea bargain on the grounds he received ineffective representation and the plea was coerced and that the district attorney suppressed evidence which would show that petitioner was innocent. Although respondent Harper appears to have alleged in the above petition that he exhausted his state remedies in that the California Supreme Court denied the petition without citation of authorities in the California Supreme Court, respondent basically made conclusory unintelligible allegations.

The United States District Court reviewed respondent Harper's petition that was filed in said Court and also reviewed respondent Harper's petition that he filed in the California Supreme Court. After reviewing the foregoing petitions, the United States District summarily dismissed respondent Harper's petition on the grounds that he exhausted his state remedies as to only one of the grounds presented in the District Court, namely, the suppression of evidence issue. The District Court found as to the remaining grounds that respondent Harper failed to exhaust his state remedies in that due to the fact it is

impossible to determine the points respondent Harper sought to raise in the California petition for writ of habeas corpus, it cannot be said that the substance of his contentions were fairly presented to the state's highest court. (Exh. A.)

After obtaining a certificate of probable cause respondent Harper proceeded with his appeal in the United States Court of Appeals for the Ninth Circuit which resulted in the opinion that is the subject of the within petition.

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

A STATE'S HIGHEST COURT'S DENIAL OF A PETITION FOR WRIT OF HABEAS CORPUS WITHOUT CITATION OF AUTHORITIES SHOULD NOT CREATE A CONCLUSIVE PRESUMPTION THAT THE COURT REACHED THE MERITS OF THE PETITION.

In the within case respondent Harper made a very poor attempt to present his federal claims to the California Supreme Court in that he presented them so ambiguously that the United States District Court properly concluded that the contentions were not fairly presented to the state's highest court. It is thus submitted for the reasons that follow that California has not had a fair opportunity to consider respondent Harper's contentions and that therefore there is a clear failure to exhaust state remedies.

In *Picard v. Conner* (1971) 404 U.S. 270, 275-276, this Court emphasized that in order to exhaust state remedies the state inmate must have first fairly presented his federal claims to the state courts. On the other hand, the United States Court of Appeals for the Ninth Circuit held herein that there was exhaustion of state remedies even though the United States District Court found that respondent Harper's petition for writ of habeas corpus,

which he presented to the California Supreme Court, contained conclusory and confusing allegations. The Ninth Circuit Court of Appeals based its conclusion on its opinion in *Harris v. Superior Court of California* (9th Cir. 1974) 500 F.2d 1124, wherein the Court held that when the state's highest court denies a petition for writ of habeas corpus without citation of authorities it is deemed that the denial is on the merits. (Appendix B.) In other words,the Ninth Circuit has placed the burden on the state's highest court of stating the reasons for the denial of a petition in that if the reasons are not stated it will be deemed that the Court reached the merits of the petition and thus will not be afforded a fair opportunity to consider the issues prior to federal intervention. As can be seen from the *Harris* case, *supra,* the Ninth Circuit based its premise on the fact that the California Supreme Court will often cite authorities when denying a petition for writ of habeas corpus, which citations will sometimes include a citation indicating the denial was for procedural reasons. However, there is nothing in California consitutional, statutory or case law to support the Ninth Circuit's conclusion that where the California Supreme Court denies a petition of writ of habeas corpus without citation of authorities it can be presumed that the California Supreme Court reached the merits of the issues presented to it. The contrary is the case in that the California Supreme Court has made it explicit that in order to obtain relief the petitioner must "allege with particularity the facts upon which he would have a final judgment overturned." (*In re Swain,* 34 Cal.2d 300, 304; 209 P.2d 793; *Gingrich v. Oberhauser* (C.D. Cal. 1969) 305 F. Supp. 738, 470.) Since respondent Harper herein when seeking habeas corpus relief from the California Supreme Court failed to make factual allegations, he clearly did not present the issues fairly to the California Supreme Court and thus did not present said Court with an opportunity to

reach the merits of the issues. Therefore there is a failure to exhaust state remedies within the meaning of this court's decision in *Picard v. Conner, supra.* Thus, the *Harris* case is in conflict with the *Picard* decision and for that reason alone the within petition should be granted. (*Heflin v. United States* (1959) 358 U.S. 415, 452.)

In view of the fact respondent Harper did not follow the proper state procedures in presenting his contentions to the California Supreme Court in that he failed to make factual allegations (*In re Swain, supra*), it is submitted that the Ninth Circuit erred in holding that whenever the California Supreme Court denies a petition for writ of habeas corpus without citation of authorities there is exhaustion of state remedies. Due process at least requires inmates to present factual allegations to the courts. (See *Kanieski v. Gagnon* (7th Cir. 1970) 427 F.2d 401, 404.) Therefore, since the state's interpretation of its procedural requirements meets the due process requirements, its interpretation is only a matter of state law. (*Rose v. Hodges* (1975) 423 U.S. 19, 21-22; *Combs v. Tennessee* (6th Cir. 1976) 530 F.2d 695, 698; *Hall v. Wainwright* (5th Cir. 1974) 493 F.2d 37, 39.) Hence, since respondent Harper herein did not properly present his contentions to the California Supreme Court it cannot be said that the California Supreme Court was presented with a fair opportunity to consider his contentions within the meaning of *Picard v. Connor, supra*, 404 U.S. 270.

Therefore, in view of the fact respondent Harper did not fairly present his federal contentions to the state courts, it is submitted that it is essential that petitioner's petition for certiorari be granted to clarify the law pertaining to exhaustion of state remedies and to ensure that the mandate of this Court's opinion in *Picard v. Connor, supra*, is understood and followed by the lower courts.

It is further submitted that certiorari should be granted

in that the Ninth Circuit's unpublished memorandum herein is in conflict with their published opinion in *Harris v. Superior Court of California, supra,* 500 F.2d 1124 1129, fn. 7, wherein the Ninth Circuit made it explicit that its holding does not apply where the contentions were not fairly presented to the state's highest court. On the other hand, in the within non-published memorandum decision the Ninth Circuit clearly has not followed the above language in footnote 7 of the *Harris* case but rather has chosen to apply the *Harris* holding to all situations where the California Supreme Court denies a petition for writ of habeas corpus without citation of authorities. It is thus becoming impossible for the United States District Courts to ascertain when a petition for writ of habeas corpus should be dismissed on the grounds of the state inmate's failure to exhaust state remedies.

Moreover, the opinion below is clearly in conflict with the Seventh Circuit Court of Appeals wherein it was held that in order to exhaust state remedies the state prison inmates must present factual allegations. (*Kanieski v. Gagnon, supra,* 427 F.2d 401, 404.) Furthermore, it is submitted that *Harris v. Superior Court of California, supra,* upon which the Court below relied in holding that respondent exhausted his state remedies is in apparent conflict with the *Kanieski* case in that the *Harris* case does not explicitly mandate that there be factual allegations in the petition presented to the state courts. Therefore, when the *Harris* case is considered in conjunction with the opinion below there is a strong conflict between the Ninth and Seventh Circuit Courts of Appeal's decisions on the within exhaustion issue. It is respectfully submitted that for this reason alone this Court should grant petitioner's petition for writ of certiorari. (*Waterman Steamship Corporation v. United States* (1965) 381 U.S. 252, 258.)

CONCLUSION

For the foregoing reasons, petitioner submits that the writ of certiorari should issue and review the decision of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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Deputy Attorney General

By DONALD R. ROESCHKE,
Deputy Attorney General
Attorneys for Petitioner

APPENDIX A

United States District Court
Central District of California

THEODORE MONROE HARPER,

Petitioner,

v.

DANIEL J. McCARTHY, Supt. Calif. Men's Colony, San Luis Obispo, California,

Respondent.

No. CV 75-3399-RF(K)

Separate Judgment and Order Pursuant to Rule 58, F. R. Civ. P.

IT IS ADJUDGED that the Petition for Writ of Habeas Corpus is dismissed.

IT IS ORDERED that the Clerk shall serve a copy of this Order and the Report and Recommendation of the United States Magistrate, by United States mail, on the petitioner.

DATED: This 23rd day of October, 1975.

/s/

ROBERT FIRTH
United States District Judge

FILED
OCTOBER 23, 1975
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
RJ DEPUTY

ENTERED
OCTOBER 28, 1975
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
RJ DEPUTY

FILED
OCTOBER 23, 1975
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
RJ DEPUTY

United States District Court
Central District of California

THEODORE MONROE HARPER,

Petitioner,

v.

DANIEL J. McCARTHY, Supt. Calif. Men's Colony, San Luis Obispo, California,

Respondent.

No. CV 75-3399-RF(K)

Report and Recommendation on Petition for Writ of Habeas Corpus by a Person In State Custody

This Report and Recommendation is submitted to the Honorable Robert Firth, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636(b)(3) and General Order 104 of the United States District Court for the Central District of California.

On October 9, 1975, petitioner, a state prisoner at California Men's Colony, San Luis Obispo, was permitted to file this Petition for a Writ of Habeas Corpus, with Exhibits "A" and "B" attached, in forma pauperis pursuant to 28 U.S.C. § 1915(a).

The Magistrate has read and considered the above records and pleadings and makes the following findings and conclusions.

Petitioner is serving a prison sentence imposed after a plea of guilty to a violaton of § 288(a) California Penal Code, Oral Copulation, in the Superior Court of the State of California for the County of Los Angeles.

He alleges that the plea was coerced by the Court, that the Court failed to keep a plea bargain, that his attorney was ineffective and that the district attorney suppressed evidence of his innocence. He alleges few facts in support thereof.

Petitioner alleges that he has previously filed three (3) petitions with this Court, alleging similar grounds. All were denied either for failure to exhaust state remedies, or for failure to state sufficient facts. It does not appear that there has been an adjudication on the merits in this Court.

Petitioner alleges that he has exhausted state remedies, and refers us to his Exhibit "A," a denial without citation of a Petition for a Writ of Habeas Corpus by the Supreme Court of California. Exhibit "B" appears to be a copy of the petition thus denied.

A review of that petition indicates that the denial cannot have been after a consideration on the merits. Petitioner alleges his grounds and facts in a confused and conclusionary fashion with reference to exhibits filed in the Federal District Court. It is impossible to determine the points he seeks to make. It cannot be said that the substance of his contentions have been fairly presented to the highest court of the state. This is required if state remedies are to be exhausted. *Picard v. Connor*, 404 U.S. 270 (1971). There is good reason to suppose that the denial without citation or opinion is not indicative of a decision on the merits. *Harris v. Superior Court*, 500 F.2d 1124 (1974).

The state court must be given the opportunity to rule on the merits of petitioner's claim. A denial on procedural grounds does not exhaust state remedies, *Picard, supra.*

Petitioner further alleges exhaustion as to the alleged grounds of suppression of evidence in a petition filed with the California Supreme Court in 1962.

Thus, we have apparent exhaustion of remedies as to one of four grounds urged. It would not be mindful of the limited judicial time available to this Court to entertain the petition at this time while state remedies remain unexplored. Petitioner has filed at least ten (10) previous petitions, all of which have been [or are in the process of being] adjudicated by this Court. Nothing in the tradition of habeas corpus requires that the federal courts tolerate needless piecemeal litigation. *Sanders v. United States,* 373 U.S. 1 (1963).

It is apparent that there are available state remedies which petitioner has not sought to exhaust. Failure to exhaust state remedies is fatal to a petitioner in this Court except in the face of unusual circumstances, which are not alleged here. 28 U.S.C. § 2254.

The Magistrate finds that it appears from the application that the petition is frivolous within the meaning of 28 U.S.C. § 1915(d) and that the petitioner is not entitled to a writ of habeas corpus from this court. The petition should be dismissed pursuant to 28 U.S.C. § 2243.

IT IS THEREFORE RECOMMENDED that an Order be issued by the Court dismissing the petition.

OCTOBER 21, 1975.

/s/

JOHN R. KRONENBERG
United States Magistrate

Pursuant to 28 U.S.C. § 636(b)(3), the Court has reviewed the records and pleadings and the Report and

Recommendation of the United States Magistrate, and concurs with and adopts his findings and conclusions.

DATED: October 23, 1975.

/s/
ROBERT FIRTH
United States District Judge

APPENDIX B

FILED
OCTOBER 29, 1980
RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

United States Court of Appeals for the Ninth Circuit

THEODORE MONROE HARPER,

Plaintiff-Appellant,

v.

DANIEL J. McCARTHY, Superintendent of California Men's Colony East,

Defendant-Appellee.

No. 76-1245
No. 76-1247
D.C. No. CV 75-3399 RF(K)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
ROBERT FIRTH, DISTRICT JUDGE, PRESIDING
ARGUED AND SUBMITTED SEPTEMBER 19, 1980

Before: POOLE, NELSON, and NORRIS, Circuit Judges.

The district court dismissed the petition for writ of habeas corpus on the theory that the claims in Harper's habeas petition to the California Supreme Court had been presented in such a confusing and conclusory manner that the State's "postcard" denial of the petition could not be construed as a denial on the merits. Our decision in this case is controlled by *Harris v. Superior Court*, 500 F.2d 1124 (9th Cir. 1974) (*en banc*), *cert. denied*, 420 U.S. 973 (1975), in which this court held that a "postcard"

denial of a petition for writ of habeas corpus by the California Supreme Court, without opinion or citation, constitutes a denial on the merits and therefore satisfies the exhaustion requirement.

REVERSED AND REMANDED.

APPENDIX C

FILED
DECEMBER 31, 1980
RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

United States Court of Appeals for the Ninth Circuit

THEODORE MONROE HARPER,
Petitioner-Appellant,

v.

DANIEL J. McCARTHY, etc.,
Respondent-Appellee.

No. 76-1245
76-1247
ORDER

Before: POOLE, NELSON, and NORRIS, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no active judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX D

FILED
JANUARY 15, 1981
RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

United States Court of Appeals for the Ninth Circuit

THEODORE MONROE HARPER,
Petitioner/Appellant,
v.
DANIEL J. McCARTHY, etc.,
Respondent/Appellee.

No. 76-1245
76-1247
DC CV 75-3399
74-2448 RF

ORDER ON MOTION FOR STAY OF MANDATE
(Rule 41(b) Fed.R.App.P.)

Upon due consideration of appellee motion for stay of the mandate of this Court in the above cause pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari, such petition to be filed in the Clerk's Office of the Supreme Court of the United States on or before February 8, 1981.

IT IS ORDERED that the motion for stay of mandate be, and the same is hereby denied.*

Dorothy W. Nelson
United States Circuit
Judge

* In the event that the motion for stay of mandate and the petition for writ of certiorari are granted, then this stay will continue pending the final disposition of the case by the Supreme Court of the United States.
CA9-003 (12/3/79)

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 3340 Ocean Park Boulevard, Suite 3005, Santa Monica, California 90405: that on March 27, 1981, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Santa Monica, California, addressed as follows:

Clerk, U.S. Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Hand delivered; forty copies)

Honorable Robert Firth
United States District Judge
United States District Court
Central District of California
United States Courthouse
312 North Spring Street
Los Angeles, California 90012

United States Court of Appeals
for the Ninth Circuit
7th & Mission Streets
P.O. Box 547
San Francisco, California 94101
Court Nos. of case: CA #76-1245,
CA #76-1247

Anthony J. Mohr, Esq.
Suite 500
9460 Wilshire Boulevard
Beverly Hills, California 90212

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 27, 1981 at Santa Monica, California.

Kirk W. Harney
(Original signed)

RECEIVED
JUN 15 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

NO. 80-1626

DANIEL J. MC CARTHY, Superintendent
California Men's Colony East,

Petitioner,

vs.

THEODORE MONROE HARPER,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BY ATTORNEY:

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Kanieski v. Gagnon, 427 F.2d 401	5
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United States ex rel Di Niro vs. Mancusi, 298 F.Supp. 1294	3

BRIEF OF RESPONDENT IN
OPPOSITION TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

QUESTIONS PRESENTED

1. Are the alleged conflicts between the circuits and between this Court and the Ninth Circuit as described by Petitioner of such magnitude as to justify granting certiorari?

2. Assuming the existence of conflicts between courts as described by Petitioner, does this case present a proper vehicle with which to resolve those conflicts?

INTRODUCTION

In 1975, respondent Theodore Monroe Harper filed a petition for writ of habeas corpus against the superintendent of California Men's Colony East, Daniel J. McCarthy. In his petition, he attacked his plea bargain because he received ineffective representation, the plea was coerced, and the district attorney suppressed evidence that would have demonstrated Harper's innocence. Respondent alleged that he was not allowed to withdraw his guilty plea after discovering exculpatory evidence. Respondent's petition followed a series of petitions for habeas corpus in the California courts, including a petition to the California Supreme Court, which issued a "post card denial" of the petition without citing any authorities.

REASONS WHY A WRIT OF CERTIORARI SHOULD BE DENIED

I

THIS CASE DOES NOT PRESENT THE PROPER FACT SITUATION WITH WHICH TO RESOLVE THE LEGAL ISSUES WHICH PETITIONER DISCUSSES

The thrust of petitioner's argument is that in the area of habeas corpus, the administration of justice will be enhanced

if the court resolves the decisional conflicts not only between the Ninth and the Seventh Circuits, but also between the Ninth Circuit and the Supreme Court (Petition, pages 7,8). While respondent agrees that it would be beneficial for the court to address these questions, respondent contends that the within case does not present the proper vehicle with which to do so.

Petitioner's entire argument depends on the assumption that Mr. Harper presented virtually nothing more than unintelligible conclusory allegations to the California Supreme Court. Respondent disagrees vigorously with this contention.

In his report, Magistrate John R. Kronenberg admitted that 1) Harper alleged "few facts" in support of his contentions (Petition, p. 12), and 2) Harper exhausted his state remedies "as to one of four grounds urged", suppression of exculpatory evidence (Petition, page 13).

At the very least, Mr. Harper's petition was "mixed"; it did contain some facts and the facts it presented were sufficient to exhaust at least one of his grounds for relief. Thus, the Attorney General errs when he claims that the petition contains "only unintelligible conclusory allegations.

Mr. Harper's petition represents the kind of effort for which the courts make an exception to the exhaustion doctrine. In Galtieri v. Wainwright, 582 F.2d 348 (5th Cir. 1978), a prisoner brought three series of unsuccessful collateral attacks in the state court system. Like Harper, his petition to the United States District Court was "mixed". The Fifth Circuit held that federal courts must weigh the conflicting interests served by the writ and the exhaustion doctrine. Exceptions to the exhaustion doctrine have been developed, said the court, to cover situations where "mechanical adherence" would not further the goals of the exhaustion doctrine or would frustrate an overriding federal concern. Id., at 354.

To the same effect is Irby v. State of Missouri, 502 F.2d 1096, 1099 (8th Cir. 1974), where the court stated that if a petitioner exhausted his state remedies on one of several claims for habeas corpus, under appropriate circumstances he may still proceed in Federal Court. Respondent submits that there is a time when a court must consider the substance and ignore defects in form. In United States ex rel Di Niro vs. Mancusi, 298 F.Supp. 1294 (S.D.N.Y. 1969), the court mentioned in a footnote that a review of the state record indicated that the petitioner presented only one of two unrelated claims. While an avenue for state relief remained available, the court "... deems it expedient to decide the claims upon the merits and thus eliminate further time consuming action on the part of state and federal judges." Id., at 1295 n.2.

Based upon these reasons, respondent believes that while it might be beneficial to address the issues raised by the Attorney General, this court should wait until the California Supreme Court issues a post card denial to a habeas corpus petition which truly does consist of "unintelligible conclusory statements".

II

THE CONFLICTS BETWEEN THE SEVENTH AND NINTH CIRCUITS AND BETWEEN THIS COURT AND THE NINTH CIRCUIT AS DESCRIBED BY PETITIONER DO NOT JUSTIFY A WRIT OF CERTIORARI

Picard v. Connor (1971) 404 U.S. 270 held that "the substance of a federal habeas corpus claim must first be presented to the state courts." Id., at 278. Underlying that holding are a century of Supreme Court decisions requiring a state prisoner to exhaust his state judicial remedies before entering the federal system. Id., at 275.

///

When the Ninth Circuit came to grips with the post card denial system of the California Supreme Court in Harris v. Superior Court, 500 F.2d 1124 (9th Cir. 1974), the intent was not to undercut Picard v. Connor, supra. On the contrary, the Ninth Circuit evidenced a desire to harmonize the post card denial system with the exhaustion requirement. The court sought to answer the question, how does one know when a claim has been denied on the merits? Up until Harris, there was no answer, and the resulting unpredictability must have had an inimical effect on the administration of justice. With Harris, the court answered the question.

> ". . . /W/hen the California Supreme Court denies a habeas corpus petition without opinion or citation, or when it otherwise decides on the merits of the petition, the exhaustion requirement is satisfied (citation)."
>
> Id., at 1128-1129.

These two decisions may easily be harmonized. Before an inmate files a habeas corpus claim, he first must present his claim to the state courts. If the state's highest court rejects the claim without citation of authorities, the petitioner is deemed to have exhausted his state remedies.

Nor does the Ninth Circuit's unpublished opinion in this case conflict with Harris v. Superior Court, supra. Footnote 7 of the Harris opinion cautions that the holding "assumes that there has been no deliberate bypass of state remedies, Fay v. Noia, supra, that the claim presented to the state court was the substantial equivalent of the claim presented to the federal court, Picard v. Connor, supra; Rose v. Dickson, 9 Cir. 1964, 327 F.2d 27, and that no other bar to the consideration by the federal court remains." Id., at 1129. The footnote does not make an exception where the contentions presented in the state's highest court are

inarticulate or where, as here, the habeas corpus petition is "mixed".

Respondent is hard put to see how the opinion below conflicts with the Court of Appeals for the Seventh Circuit. Neither Harris nor the unpublished opinion in this case holds that it is unnecessary to present factual allegations in order to exhaust state remedies. In fact, Harris cites In re Swain (1949) 34 C.2d 300, 209 P.2d 793 in a context suggesting that the court approves of its holding. 500 F.2d, at 1128. In Kanieski v. Gagnon, 427 F.2d 401 (7th Cir. 1970), the petitioner, after being apprised of the defective nature of his allegations, continued to rely upon his unsupported conclusions (427 F.2d, at 404). If a conflict exists between the Seventh and Ninth Circuits, its magnitude does not justify intervention by the United States Supreme Court.

CONCLUSION

Based on the reasons stated in the foregoing, respondent submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

ANTHONY J. MOHR,
Attorney for Respondent

STATE OF CALIFORNIA, COUNTY OF

I, the undersigned, say (check applicable paragraph):

☐ I am a party to this action. I have read the foregoing document and know its contents. The matters stated in it are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

☐ I am an officer a partner_____ of _____, a party to this action, and am authorized to make this verification for and on its behalf, and I make this verification for that reason. I have read the foregoing document and know its contents. I am informed and believe and on that ground allege that the matters stated in it are true.

☐ I am one of the attorneys for _____, a party to this action. Such party is absent from the county of aforesaid where such attorneys have their office, and I make this verification for and on behalf of that party for that reason. I have read the foregoing document and know its contents. I am informed and believe and on that ground allege that the matters stated in it are true.

Executed on _____, 19____, at _____, California.

I declare under penalty of perjury that the above is true and correct.

_____
(Signature)

Subscribed and sworn to before me this _____ day of _____, 19____.

Notary Public in and for said County and State

ACKNOWLEDGMENT OF RECEIPT

Received copy of the within document on _____, 19____.

_____
(Signature)

PROOF OF SERVICE BY MAIL

I am a resident of the county aforesaid; I am over the age of 18 and not a party to the within action; my business address is:

9460 Wilshire Boulevard, Suite 500, Beverly Hills, California 90212

On June 10, 1981, I served the within document on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Beverly Hills addressed as follows:

SEE ATTACHED LIST

Executed on June 10, 1981 at Beverly Hills, California.

(check applicable paragraph below)

☐ (State) I declare under penalty of perjury that the above is true and correct.

☒ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Jane B Colburn
(Signature)

WOLCOTTS FORM 814, Rev. 6-79

Clerk, U. S. Supreme Court
One First Street, N.W.
Washington, D.C. 20543

United States Court of Appeals
for the Ninth Circuit
7th & Mission Streets
P.O. Box 547
San Francisco, California 94101
Court Nos. of case: CA #76-1245,
CA #76-1247

Honorable Robert Firth
United States District Judge
United States District Court
Central District of California
United States Courthouse
312 North Spring Street
Los Angeles, California 90012

Donald Roeschke, Deputy
Attorney General
3580 Wilshire Boulevard
Los Angeles, California 90010

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

NO. 80-1626

DANIEL J. MC CARTHY, Superintendent
California Men's Colony East,

Petitioner,

vs.

THEODORE MONROE HARPER,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Pursuant to Rule 46, paragraph 1, of the Rules of this Court, motion is hereby made that respondent Theodore Monroe Harper be allowed to proceed in forma pauperis. An affidavit of respondent's counsel is attached to this motion.

BY ATTORNEY:

ANTHONY J. MOHR
9460 Wilshire Boulevard
Suite 500
Beverly Hills, California 90212

AFFIDAVIT OF ANTHONY J. MOHR

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

ANTHONY J. MOHR, being duly sworn, deposes and says as follows:

1. I am an attorney at law licensed to practice before all of the courts of the State of California and before the Supreme Court of the United States. The facts as stated herein are personally known to me, and I have first-hand knowledge of the same. If called as a witness I would be competent to testify thereto.

2. On June 26, 1979, the United States Court of Appeals for the Ninth Circuit appointed me to represent Theodore Monroe Harper. I was appointed pursuant to the Criminal Justice Act of 1964, as amended.

3. The only compensation I have received from this case has come from the United States Treasury. Neither Mr. Harper nor anyone acting on his behalf has paid any money to me or (to my knowledge) to anyone else in connection with the within matter.

4. Based upon the foregoing, I respectfully request permission to proceed in forma pauperis on behalf of Mr. Harper.

I declare under penalty of perjury that all facts stated in the foregoing are true and correct.

ANTHONY J. MOHR

Subscribed and sworn to before me
this 10 day of JUNE, 1981.

Notary Public

OFFICIAL SEAL
BARRY A. SCHULMAN
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My comm. expires JUL 28, 1981